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Supreme Court, U.S.
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No. 96-1487

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

vs.

HOSEP KRIKOR BAJAKAJIAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES E. BLATT
Counsel of Record
MICHAEL G. RAAB
THE LAW OFFICES OF
JAMES E. BLATT
Attorneys for Respondent
16000 Ventura Boulevard
Penthouse Suite 1208
Encino, California 91436
(818) 986-4180

QUESTION PRESENTED

Whether forfeiture of lawfully possessed currency under 18 U.S.C. § 982(a)(1) is unconstitutional under the Excessive Fines Clause of the Eighth Amendment where the crime committed is a mere failure to report transportation of currency, in violation of 31 U.S.C. § 5316.

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OPINION BELOW

The opinion of the court of appeals (Petition's App., 1a-14a) is reported at 84 F.3d 334.

STATEMENT OF JURISDICTION

The statement of jurisdiction is set forth with sufficient particularity and accuracy in Petitioner's brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of constitutional and statutory provisions involved is set forth with sufficient particularity and accuracy in Petitioner's brief.

STATEMENT OF THE CASE

A. The Offense

On June 9, 1994, Respondent and his wife attempted to board an Alitalia Airway flight leaving Los Angeles International Airport and destined for Lanarca, Syria via Rome, Italy. Unbeknownst to Respondent, his flight was the subject of an examination by a customs service canine trained to detect the presence of currency. The canine alighted on Respondent's luggage and a search of the luggage revealed $230,192.

A customs service inspector approached Respondent as he and his wife were preparing to board their flight. The inspector explained the currency reporting requirements to Respondent and his wife and asked whether they had in their possession currency in excess of $10,000. Respondent informed the inspector that he had $8,000 in his possession and his wife,

$7,000. A search of Respondent and his wife further revealed an additional $127,012. After an additional search of Respondent's luggage, the total amount of currency found in his possession was $357,144. The currency was seized and Respondent was taken into custody. Respondent was ultimately charged, in a three count indictment, with 31 U.S.C. § 5316(a)(1)(A); 31 U.S.C. § 5322(a); 18 U.S.C. § 1001; and 18 U.S.C. § 982(a)(1).

In an interview with customs agents after Respondent's arrest for the failure to declare his possession of currency in excess of $10,000, Respondent gave an explanation as to the source of the seized currency. Subsequently, Respondent provided another explanation for the source of the seized funds and, prior to sentencing, provided the government and court with documentation supporting a third explanation.

B. The Plea

On October 27, 1994, Respondent moved to change his plea of not guilty and entered a guilty plea to count one of the indictment which charged Respondent with 31 U.S.C. §§ 5316(a)(1)(A), 5322(a). Pursuant to the plea agreement, the government agreed to dismiss count two at the time of sentencing. The parties also stipulated to having count three, the forfeiture count, tried to the court as a bench trial.

On December 20, 1994, the district court found that the government had satisfied its burden that the seized funds were subject to forfeiture and the court invited the parties to submit briefs regarding the amount of forfeiture which was to be decided at sentencing.

C. Sentencing and Forfeiture

At the time of sentencing, the district court entertained argument regarding what amount of the seized currency should be forfeited, among other sentencing issues unrelated to this Petition.

In reference to the seized currency, the United States Probation Department found that the subject funds were legally obtained and for a lawful purpose. The government also conceded that Respondent had a legitimate debt in Syria and acknowledged that it had no evidence that the $357,144 were the proceeds of an unlawful activity. However, the government urged the district court to apply a proportionality analysis with the burden placed upon Respondent. The government also argued that forfeiture in the case is purely remedial but that, if forfeiture was found violative of the Eighth Amendment, the court may mitigate the amount to be forfeited.

Respondent submitted a trial memorandum and supplemental memorandum of law re: forfeiture and judicial discretion under the Eighth Amendment. In these briefs, Respondent explained and provided documentation for the sources of the $357,144, described the purpose for the currency, admitted his crime, and apologized for his transgression. Respondent, however, urged the court to exercise its discretion and mitigate the mandatory forfeiture provisions of 18 U.S.C. § 982(a)(1).

At the sentencing hearing, the district court stated:

> I do believe that the United States Currency was in the suitcase and in the carry on luggage for reasons that were not illegal. I do believe that, even though its a somewhat

> suspicious and confused story, documented in the poorest way, replete with past misrepresentations, that the funds were — the funds of the defendant, and borrowed funds.
>
> I do believe . . . that the funds were the proceeds of a lawful activity, and that they were to be used for a lawful purpose; to wit, to pay some lawful obligation. . . .

The district court reached this conclusion after hearing from both the government and Respondent. The district court ruled:

> First of all, there is little doubt that forfeiting the entire amount would certainly be extraordinarily harsh, and would violate the Eighth Amendment. And I would not, under the circumstances attain — order the forfeiture of the entire $357,000 plus dollars. That would be grossly disproportionate to the offense in question. The offense, after all, was an important, but nevertheless minor offense, the failure to disclose.
>
> . . . So the amount of forfeiture will be modest, and will be very minor, because in truth, and in fact, I think none should be forfeited. But it will make up for what I think a reasonable fine should be.

Thus, respondent was sentenced to three years formal probation, fined $5,000, and ordered to forfeit $15,000 of the seized currency.

D. The Ninth Circuit Appeal

The government appealed the district court's ruling, which the Ninth Circuit affirmed. Focusing on the fact that the currency was lawfully acquired and possessed, the court applied a two prong excessive fines test to the forfeiture in question. Pursuant to the Ninth Circuit's excessive fines test, forfeiture is constitutional "if (1) the property forfeited is an 'instrumentality' of the crime committed; and (2) the value of the property is proportional to the culpability of the owner."

The court held that the currency at issue was not an instrumentality of the offense and, in so holding, ruled that "[f]orfeiture of currency is unconstitutional when the crime to which forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316."

The court, relying on *United States v. $69,292 in United States Currency*, 62 F.3d 1161 (9th Cir. 1995), refused to find the seized currency an instrumentality because lawfully acquired as possessed currency lacks "that necessarily close relationship to the crime simply because it has not been reported."

> Simply put the existence of the currency does not make it an instrumentality. For example, we would not characterize lawfully earned income as instrumentality simply because a taxpayer failed to report that income on his tax return in violation of the tax code. The government would have us stretch the fiction of an 'instrumentality' to the breaking point.

Id. At 1167-68, referring also to *Austin v. United States*, 113 S. Ct. 2801, 2811 (1993) (rejecting expansive definitions as to what qualifies as the instrumentality of a particular crime.)

The court further explained "the money at issue in a § 5316 violation is not contraband, and the money is presumed under the statutory scheme to be lawfully acquired and possessed." Thus, unlike smuggled contraband or a vehicle used to transport contraband, the unreported currency is not an instrumentality of the crime and forfeiture of any amount in violative of the Eighth Amendment's Excessive Fines Clause.

Judge Wallace concurred in the court's result but disagreed with the court's conclusion that the currency was not an instrumentality. Although Justice Wallace felt that the currency was an instrumentality of the offense, he did not believe that the district court's finding's were clearly erroneous. As such, he would affirm the $15,000 forfeiture.

REASONS FOR DENYING THE WRIT

The government misconstrues the holding in this case. Ruling that forfeiture of currency is unconstitutional when the crime to which the forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316, the Ninth Circuit's opinion focused on the legitimate nature of the currency in issue. The question, then, is not whether forfeiture under 31 U.S.C. § 5316 is per se unconstitutional, but whether the government is entitled to currency which was lawfully possessed and intended for a lawful purpose.

As such, this case does not strike down a portion of an Act of Congress but limits its application. This case is not in conflict with the Second Circuit's decision in *United States v. United States Currency in the Amount of $145,139*, 18 F.3d 73, *cert. denied*, 115 S. Ct. 72 (1994). Petitioner's reliance on *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (per curiam) is misplaced. Finally, Petitioner would have this Court engage in a factual excessive fines analysis which was performed

appropriately in the district court. For these reasons, review by this Court is unwarranted.

1. Petitioner attempts to persuade this Court that the Ninth Circuit has held that "forfeiture required by Section 982(a)(1) is per se unconstitutional as applied to Section 5316 offenses" and, as a result, the Ninth Circuit has invalidated an Act of Congress. *See United States v. Gainey*, 380 U.S. 63, 65 (1965). This characterization of the Ninth Circuit's ruling is, however, an oversimplification. The focus of the Ninth Circuit in this case, as well as in *United States v. $69,292.00 in United States Currency*, 62 F.3d 1161 (1995), is on the legitimate nature of the currency which the government seeks to forfeit.

When the case is examined in the appropriate light, Petitioner's claim of the far-reaching impact of this case is not compelling. This case does not strike down an Act of Congress but tempers the government's ability to forfeit lawful currency. The case does not address forfeiture of unreported currency related to narcotics, money laundering, or racketeering. Forfeiture of such funds is not in question. The ruling in this case does not prevent seizure of unreported currency and a subsequent investigation into the legitimacy of that currency. If the currency is somehow tainted with illegality, forfeiture is appropriate and, under this case, permissible. If, however, the currency cannot be construed as illegitimate, as with Mr. Bajakajian's currency, the government simply cannot keep it.

In this respect, the ramifications of this case are not as drastic as Petitioner claims. Forfeiture is not per se unconstitutional but is only so when the government cannot establish the illegitimacy of the funds.

2. Respondent recognizes that a square and irreconcilable conflict between federal courts ordinarily should be enough to

secure review. *See, e.g., McElroy v. United States*, 455 U.S. 642, 643 (1982); *Marks v. United States*, 430 U.S. 188, 189 (1977); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981). A square and irreconcilable conflict, however, does not exist between this case and *United States v. United States Currency in the Amount of $145,139, supra*. The focus of the Second Circuit in *United States Currency in the Amount of $145,139*, was on *United States v. Halper*, 490 U.S. 435 (1989) and whether the Double Jeopardy Clause prevented forfeiture of the currency at issue. Although the Second Circuit did address the Excessive Fines Clause, that portion of the opinion was unrelated to the "instrumentality" analysis. Under these circumstances, the two opinions are readily distinguishable.

More important, however, is the fact that the Second Circuit never addressed the one critical aspect of this case: that the seized currency was legitimately possessed and intended for a legitimate purpose. Without an examination of the legitimate nature of the currency in the "instrumentality" analysis, *United States Currency in the Amount of $145,139*'s discussion of § 5316 forfeitures is incomplete and does not conflict with this case.

If this Court determines that a conflict does exist, Respondent contends that such conflict does not warrant review in this case. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (certiorari denied to enable the Court to address the issue at a later date.); *Bealieu v. United States*, 497 U.S. 1038, 1039 (1989) (certiorari denied even though conflict existed); *Chelsea House Publishers, et al. v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994 (1982) (certiorari denied even though 22 cases existed in which lower courts had split 14-8).

Furthermore, Respondent submits that the resolution of any perceived conflict herein is irrelevant to the ultimate outcome

of this case, *i.e.*, whether the government must return the seized currency. *See, e.g., Sommerville v. United States*, 376 U.S. 909 (1964). Even Justice Wallace, who felt that the currency was not an instrumentality, could find no clear error committed by the district court in its factual excessive fines analysis.

3. Petitioner's reliance on *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) to establish a conflict with Supreme Court precedence is misplaced. In *One Lot Emerald Cut Stones*, this Court addressed the issue of whether the Double Jeopardy Clause will bar the civil forfeiture of smuggled goods after an acquittal on the underlying criminal prosecution for customs violations. *Id.* at 235-237. This case presents none of those issues. The sole issue here is whether the forfeiture of legitimate, unreported currency violates the Eighth Amendment's proscription against excessive fines.

The property sought to be forfeited in *One Lot Emerald Cut Stones* was forbidden merchandise and forfeiture served a remedial purpose. *Id.* at 237. Forfeiture of legitimate money involved in undeclared currency violations is readily distinguishable from the forfeiture of the contraband gems in *One Lot Emerald Cut Stones*. The currency at issue in § 5316 violations is presumed to be lawfully possessed and is not subject to duty; it is not illegal to take the currency out of the country. Such was not the case with the smuggled gems in *One Lot Emerald Cut Stones*.

Forfeiture of property which is not contraband has been addressed previously by this Court. In *Austin v. United States, supra*, at 621, the Court relied on *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965), to contrast forfeitures of contraband against forfeitures of items which are legally possessed but used in the commission of crime. In both *Austin* and *One 1958 Plymouth Sedan*, the Court criticized the

government's attempt to characterize lawfully possessed property as "instruments." *Ibid.* In the same manner, Petitioner's attempt to find a similarity between this case and *One Lot Emerald Cut Stones* must fail.

4. The correctness or erroneousness of the decision below is not meant to be the central focus of the Court's exercise of its certiorari jurisdiction. As Justice Rhenquist said for the Court in *Ross v. Moffitt*, 471 U.S. 600, 616-617 (1974), "[this Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." Respondent contends that the decision below was correct. Regardless of the correctness of erroneousness of the decision, Petitioner's claim of error is not grounds for review.

In its claim that this case was erroneously decided, Petitioner encourages this Court to grant certiorari because "nothing in this case suggests that forfeiture of the undeclared cash was an excessive fine." This argument, supported by a line of unrelated narcotics forfeiture cases, *see United States v. Elder*, 90 F.3d 1110 (6th Cir.), *cert. denied*, 117 S. Ct. 529 (1996); *United States v. Milbrand*, 53 F.3d 841 (2nd Cir. 1995), *cert. denied*, 116 S. Ct. 1284 (1996); *United States v. Wild*, 47 F.3d 669 (4th Cir.), *cert. denied*, 116 S. Ct. 128 (1995); *United States v. Myers*, 21 F.3d 826 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 742 (1995), inappropriately encourages this Court to engage in a factual excessive fines analysis which was properly performed in the district court. Indeed, even Justice Wallace, who disagreed with the conclusion that the currency was not an instrumentality, found that the district court had not erred in its ruling.

Also in its argument that the Ninth Circuit committed error, Petitioner claims the court of appeals made no distinction between currency that has a legitimate source and cash that is linked to illegal activity. This claim is incorrect. It is apparent

from the court of appeals' ruling that the legitimacy of the currency was the most important aspect of the "instrumentality" analysis. Thus, there is no merit to Petitioner's concern that illegitimate currency may escape seizure.

In essence, the government seeks for its own coffers currency which was legitimately obtained, lawfully possessed, and intended for a lawful purpose. This Court should view the government's efforts with great scrutiny and care. Whether characterized as a forfeiture or fine, "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution or deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; [whereas] fines are a source of revenue. . . . [i]t makes more sense to scrutinize governmental action more closely when the State stands to benefit." *Harmeline v. Michigan*, 501 U.S. 957, 979 n. 9 (1991) (Scalia, J., plurality opinion.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES E. BLATT
Counsel of Record
MICHAEL G. RAAB
THE LAW OFFICES OF
JAMES E. BLATT
Attorneys for Respondent
16000 Ventura Boulevard
Penthouse Suite 1208
Encino, California 91436
(818) 986-4180